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CENTRAL INTELLIGENCE AGENCY

WASHINGTON, D.C. 20505

OMB

16 SEP 1975

Mr. James M. Frey
Assistant Director for Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

Enclosed is a proposed report to Chairman Eastland, Senate Committee on the Judiciary, in response to a request for our recommendations on S. 1289, a bill "To amend chapter 5, subchapter II of title 5, United States Code, to provide for improved administrative procedures."

Advice is requested as to whether there is any objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

SIGNED

George L. Cary
Legislative Counsel

Enclosure

Distribution:

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CENTRAL INTELLIGENCE AGENCY

WASHINGTON, D.C. 20505

Honorable James O. Eastland, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for our views on S. 1289, a bill further amending the Administrative Procedures Act of 1946 to require certain employees of executive agencies to maintain, for varying degrees of public disclosure, records of certain oral or written communications initiated outside the agency, and to require agency officials compensated under the Executive Schedule of Title 5 to maintain their "prospective and retrospective calendars" for public inspection.

It seems apparent that S. 1289 is intended to insure open proceedings in those administrative agencies which affect private rights or public interests through adjudicatory, rule making, or related actions. The Central Intelligence Agency is not such an administrative authority. It was established by the National Security Act of 1947 to coordinate the intelligence activities of the United States; to correlate, evaluate and disseminate foreign intelligence; and to perform other functions and duties related to intelligence and affecting the national security. Therefore, the Agency's interest in this legislation is limited to the concern that certain sections could impinge upon these statutory responsibilities.

Subsection (d) of the new section "5 U.S.C. 560" proposed in S. 1289 would require officials compensated under the Executive Schedule to maintain "prospective and retrospective calendars for public inspection in the public reading room of the agency." The Director and Deputy Director of Central Intelligence are compensated under this schedule and, therefore, apparently would be subject to this requirement.

Whatever merits this disclosure requirement would have with respect to the regulatory functions of administrative agencies, if applied to the calendars of the Director and Deputy Director of Central Intelligence, it would impair the nation's foreign intelligence efforts and raise serious statutory conflicts.



Disclosure of the identities of individuals with whom the Director or Deputy Director are in contact and the frequency and pattern of these contacts would be of significant intelligence value to rival powers and could betray, and therefore nullify, intelligence sources and methods, which the Director is obligated to protect pursuant to Section 102(d)(3) of the National Security Act of 1947. Moreover, where the names and functions of Agency personnel are recorded therein, publication of these calendars would contravene Section 6 of the Central Intelligence Agency Act of 1949 which exempts the Agency "from the provisions of any other law which requires the publication or disclosure of the organization, functions, names, or ... numbers of personnel employed by the Agency." Further, this publication requirement could discourage private individuals from contacting the Director or Deputy Director on matters in which they would otherwise be willing to assist the Government's foreign intelligence program. In sum, proposed subsection (d), while in no way furthering the public interests which S. 1289 seeks to promote, would be harmful to the nation's foreign intelligence interests. For this reason, I am opposed to S. 1289, as drafted.

The other provisions of S. 1289 are more clearly directed at the regulatory functions of Federal administrative agencies. However, the language of subsection (b)(1) is ambiguous and elastic enough to warrant some clarification.

Under subsection (b)(1) each "agency official" is required to maintain for summary disclosure records of oral or written communications initiated by persons outside the Agency pertaining to "a substantive policy matter before the Agency."

The first point to be noted with respect to this subsection is that in general officials of this Agency would not be subject to its provisions. "Agency Official" is defined in S. 1289 as "those employees of the Executive branch who are compensated in grade 15 and above under the General Schedule under section 5332 of title 5 (emphasis added)." Section 5332 establishes the basic pay schedule for positions to which Subchapter III, Chapter 53 of Title 5 applies. Section 5331 provides that "agency" and "employee," for purposes of Subchapter III, have the meanings given them by Section 5102. Section 5102 specifically provides that "agency," for purposes of Chapter 53, does not include the Central Intelligence Agency. However, "agency

official" is further defined in S. 1289 to include those compensated under the Executive Schedule. This would encompass the Director and Deputy Director of Central Intelligence. Thus, the only officials of the Central Intelligence Agency who could be deemed subject to the provisions of subsection (b)(1) are the Director and Deputy Director.

However, subsection (b)(1) only requires the maintenance of records for summary disclosure of communications initiated by persons outside the agency "pertaining to a substantive policy matter before the agency." A "substantive policy matter" is further defined in S. 1289 as "any important agency action" or any "policy issue as prescribed in regulations promulgated by the agency."

"Agency action" is defined in 5 U.S.C. 551 (13). The term "policy issue" is not defined in the United States Code. It appears from the context and usage of the term, however, to apply to policy decisions of Federal regulatory agencies in their enforcement role. This interpretation is supported by the proviso in subsection (b)(1) that "no such regulation shall apply to agency proceedings as defined in section 551 (12) of this chapter." Federal agency proceedings thus defined include rule making, adjudication and licensing as set forth in 5 U.S.C. 551 (5), (7), and (9). Apparently, the proviso is intended to except agency rule making, adjudication and licensing for summary disclosure although those proceedings deal with policy issues. Thus, it appears that the requirement of maintenance of records for summary disclosure is directed at the enforcement functions of Federal regulatory agencies and would not apply to the Central Intelligence Agency. In any case, we believe that the language of subsection (b)(1), especially the term "policy issue," is ambiguous enough to require clarification.

Sincerely,

W. E. Colby
Director